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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 475

ROBERT ELMER GALLEGOS,

Petitioner,

—vs.—

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

REPLY BRIEF OF THE PETITIONER

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I

Statement of the Case

Discrepancies can be noted in what witnesses said from the whole record. But the defendant is entitled in a criminal case to the construction favorable to him where there is a reasonable doubt. Let us look at the record to verify the discrepancy in testimony, giving an example:

Detective Paul O. Chism, kept by the District Attorney as his witness in the trial before the jury, had testified previously in the hearing on the plea of former jeopardy:

> Q. The fact of the matter is that you did testify from your same statements as given to the Juvenile Court. Is that correct?
>
> A. Except for the fact that Mr. Smith died.
>
> Q. But everything else would be the same. Isn't that true?
>
> A. Yes.

Q. In other words, you would not change the statements in any way, would you?

A. No, sir.

Q. And you would have no additional information you would add to it, would you?

A. Except the fact Mr. Smith died.

Q. Now, in your investigation, according to Judge Gilliam's (fol. 51) testimony, there were actually two statements made?

A. Two separate reports, yes, sir.

Q. As I understand, they first made one statement and then changed it.

A. I understand you now. Yes, sir, that is correct (R. 27).

The same witness, Paul O. Chism, however, upon the trial:

> The Court: Who did this?
>
> The Witness: Robert. And then he proceeded to get his billfold out of his rear pocket and left.
>
> That was the first information I had from the boys. I have the information here.
>
> *I took Mr. Kruhd to Juvenile Hall where he identified Robert and Eddie as the boys that had assaulted him.** I took Mr. Kruhd to Juvenile Hall 1/5/59 at 5:10 p. m. He identified Robert Gallegos as the one that held him and Edward Martinez as the one that struck him.
>
> . . . He also told me after they followed Mr. Smith, that he and Robert followed Mr. Smith upstairs and locating him in his room he asked for a drink of water, and when Mr. Smith brought it to him he grabbed Mr. Smith and Robert struck Mr. Smith with a shoe brush. Robert verified the information on both parties and added one other thing (R. 193).

---

* Italics ours unless noted.

> *I told them that Robert stated* one had a knife and I asked which one had a knife. . . . (R. 118)

Eddie Martinez, 11, was not picked up until the following day, therefore no statement could have been secured from all three as testified, until Bobby Gallegos had been in solitary at least 24 hours (R. 125).

II

ARGUMENT

The defendant is entitled to a construction of the facts that would give him the benefit of all reasonable doubt.

A. Defendant's Confession Was Involuntary and Improperly Admitted.

Let us look at the record again to show that Exhibit D was obtained after holding this child in solitary confinement for five days. The statement that was first given was a complete denial (R. 161-163). Detective Charles W. Miller (R. 211):

> A. No sir. We were out of the Juvenile Hall and I asked the three boys—they were brought down—and that I told them that it was my job *to attempt to obtain a statement*, and at that time I outlined what I had previously said . . .
>
> Q. Now with reference to your first request as to whether or not he wanted a lawyer, what did Robert say to that? Did he answer it at all?
>
> A. Yes. They shook their heads—*I mean, they gave me no indication.*
>
> Q. So when you asked if they wanted their parents, they shook their heads did they?
>
> A. *They did not indicate they wanted them there.*

Q. And when you told them it had to be voluntary, what did you say?

A. I told them they did not have to come with me to the Police Building, and they said they wanted to go. . . .

Q. And you previously talked to Richard at Juvenile Hall?

A. Yes, sir.

Q. What date was that?

A. I believe it was the evening of January 3.

Q. And Richard Gallegos was the boy eight years old?

A. He was eight years old (R. 214).

Mother of Robert Gallegos:

Q. When he was first there, did you go to see Robert? (R. 223)

A. I went on the 2nd of January, and when I got there they told me I could not see Robert because he was under investigation. . . .

In the answer brief the above is cited as evidence, but this evidence was stricken by the court (R. 225). However, there is no dispute that Mrs. Gallegos was not permitted to see her son on the 2nd of January, 1959, and was not permitted to see him until the investigation was complete.

. . .

1. Insofar as to the question of whether *the defendant was kept in solitary confinement is concerned*:

Q. How long was Bobby Gallegos kept in *solitary* confinement before he gave you this final statement?

A. Which statement do you mean?

Mr. Vigil: . . . But they cooperated with you in holding this boy, Robert Gallegos, by holding him in *solitary*?

A. They held him in *solitary* as you put it, which is security by rules of the Juvenile Hall. I didn't have anything to do with that.

Q. It is *security* as you put it, a room where they keep a man where he cannot talk to anybody?

A. That is correct (R. 204).

Q. And you did not tell him, did you, that *he could have a lawyer*?

A. No, sir.

Q. He was the first one to talk to you about this, isn't that true? (R. 205)

A. That is a little different. All three boys were in the car and upon asking what happened, Richard was the first one that mentioned about what happened. Then Robert told me (R. 206).

Q. And based on that information you secured, you immediately took them to Juvenile Hall and asked they be put in *solitary*?

A. Most certainly not. I had nothing to do with putting them in *solitary*.

Q. You know they are placed in solitary, don't you, when you take them to Juvenile Hall?

A. Yes, for *twenty-four hours*. That was on the order of the court.

Q. But in this particular case *Robert was kept there for seven days*.

A. *That I do not know*.

Without Exhibit D, which was the signed statement, there would be no evidence against the defendants (R. 116).

The mother was not advised how serious the matter was nor that the defendant could have an attorney (R. 134).

What does the record say of solitary confinement?

Detective Paul O. Chism:

Q. Did they put them in *solitary*?

A. That I don't know.

Q. You know that is customary?

A. I know it is customary.

Q. How long do they keep them there?

A. Twenty-four hours.

Q. How long did they keep these boys?

A. I don't know.

Q. Did they question them there for all five days while they were there?

A. *I more or less*—you have the information they had given me.

Q. You have here what has been marked as People's Exhibit A. This is a statement you stated had been written in longhand and apparently signed by all three of these boys?

A. Yes, sir.

Q. Do you contend this is a joint statement made by all three of them at once?

A. They were all together. . . .

Q. Is it the information from all three or one?

A. All three (R. 123).

Nothing shows Bobby Gallegos was warned that his statements had to be voluntary (R. 132). The shoe brush was secured by Detective Chism by going to the home of Robert and getting his shoe shine kit where all of them identified the shoe brush as the one *Eddie* used (R. 134).

Detective Miller states that the boys are generally kept in solitary twenty-four hours and that they had been kept in solitary (R. 142).

Detective Miller talked to Richard, age 8, on the evening of January 3d (R. 143).

Robert Elmer Gallegos stated that Detective Chism had said that he had beat up some old man, but that he, Robert Gallegos told him he had nothing to do with it and "didn't know nothing about it". Robert states that he was kept in a room alone for five days. Nothing was said about a lawyer or talking to anyone, including his mother and that he was questioned three times and the first time he told the officer that he knew nothing about this (R. 156).

District Attorney Kane states:

> Q. You knew about the procedure, and so on, this *solitary*?
> A. Yes (R. 160).

Bobby Gallegos states that he was taken from solitary to the Police Building and then put back in security and the next day he got out (R. 162).

The record is replete with references to "solitary" (see R. 178, R. 203, R. 204, R. 206, R. 211, R. 223-225).

2. *Bobby Gallegos was held for a period of five days and until the written statement was secured.*

The District Attorney, in the trial of this case, was relying upon the written statement, Exhibit D, in order to secure a conviction.

The first alleged oral statement was a total denial by Bobby Gallegos. His eight-year-old brother made a statement to the officers after being held incommunicado for at least two days until the evening of January 3d. Police listened over a bugging system, then took a statement (R. 144). We heard Eddie Martinez say, "What did you tell that guy?" Then Richard, 8, stated "I told him the truth". . . . (over bugging system) . . . we ran up (R. 146).

The opinion of the Supreme Court of Colorado at page 10 quotes from the record (R. 164).

> Q. These answers right here (indicating Exhibit D) that you gave Detective Miller, what was the reason you gave those answers? (R. 164)
>
> A. I was scared that if we did not do it they would keep us in security longer. . . .

If, as the answer brief contends, they already had a confession from Bobby Gallegos, it was not necessary to hold him in *solitary* confinement until he signed Exhibit D, which was the exhibit used to convict Bobby Gallegos in Juvenile Court and District Court.

The District Attorney stated that no other evidence to convict existed except Exhibit D.

> Mr. Rossman (District Attorney): With the ruling of the Court *on the statement as to Eddie Martinez*, and as to the inability to testify, we have no way of proving anything against Eddie Martinez without the confession (R. 191).

3. With regard to this 14-year-old boy, *we say he was mentally retarded and that he had, in accordance with the record cited, a mental age of 8*:

> A. This, in the I. Q. test, if he is fifteen he would be about eight or nine; he speaks the language of a child you might expect at eight or nine. . . . and to agree at a proper time and *I am sure he would follow in a given situation* (R. 264). . . .
>
> Q. On the basis of that test do you feel he might make statements to attract attention?
>
> A. Yes. . . .
>
> Q. Doctor, what do you think would be the effect on this boy being confined for seven days in a room

alone, although he might be permitted to have his lunch with other boys, would that have any effect on his making a statement?

A. I don't doubt that being confined for seven days in a room alone would have an effect on his making a statement.

Q. And would that be the effect of complying with whatever was requested of him, is that correct?

A. I imagine it would have that effect, yes (R. 267).

The letter submitted to the Court by Dr. L. V. Tepley, a psychiatrist (R. 14): " . . . Robert Gallegos was deprived of many of these contributing forces to such an extent that he is inherently incapable of resisting an impulse to do wrong, if led or encouraged by a more aggressive companion" (R. 14).

4. *The defendant* (and his two companions, one age 8 and the other age 11), *did not have the benefit of counsel.*

Q. Now, you had previously talked on January 3d to Richard because he had called you out there to talk to you. Is that correct?

A. That is correct.

Q. *When you talked to Richard did you tell him he didn't have to tell you anything, that he could have a lawyer or call his parents?*

A. *No.* I asked Richard what he wanted to tell me (R. 147).

Although one of the detectives testified that he offered counsel to the boys, that they did not give him any response, and the boys testified that they were not offered any counsel nor were they permitted to see their parents. The mother was not permitted to see her son when she went to the Juvenile Hall to see him (R. 159-211, R. 223-225).

B. The Court-Appointed Psychiatrists Were Called to Testify.

To reiterate: The testimony of the doctors appears (R. 167. See also R. 168).

> The Court: I will make it clear for the record. Calling psychiatrists has nothing to do with whether or not the boys are sane or insane. The statutes provide that where the defendants are children they must know the distinction between good and evil and the question of sanity or insanity has nothing to do with it. Under the statute the Court has to know, and it has to be shown, whether they know the distinction between good and evil. Assuming they are both sane, the Court must know whether they know the distinction between good and evil. . . .
>
> The doctor's report made to the court was that both boys knew the distinction between good and evil and that is why I called the doctors in.
>
> The court is doing this, of course, because the court fully realizes that in this trial we are dealing with children and we have to have some help . . . (R. 170).

Dr. Charles A. Rymer called as a witness (R. 172).

> Q. Do you know you were called at the instance of these boys, that is you were to make the examination at their instance . . .
>
> The Witness: Mr. Cisneros did call our office after he knew I was appointed (R. 173). . . .
>
> Q. For the record, your name.
>
> A. R. Robert Cohen, physician, specializing in psychiatry.
>
> Q. In accordance with an order of this court you were appointed to examine the defendant . . . (R. 174) to examine the defendant Robert Gallegos, and Eddie Martinez.

A. Yes, sir.
Q. And you did make such examination?
A. Yes, sir....

C. All Laws Must Be Interpreted to Give an Individual the Benefit of an Equal Interpretation Under the Due Process Clause of the Constitution.

Colorado's interpretation of its own Juvenile Delinquent Statute must be in conformity with what is obviously intended by the legislature and the Colorado courts must follow the plain language and the intent as indicated by the Court and also follow the clear understanding of this statute. The answer brief states that Bobby Gallegos was an inmate of the State Industrial Scho . But it was for the exact and same factual situation on which the murder charge in the District Court was based.

Obviously this is not an exception under the law and the situation of Bobby Gallegos is that he was in the Industrial School because the District Court convicted him on the same statement of facts that he was convicted upon in the Juvenile Court. Every individual is entitled to the equal protection of the law, and the equal protection of the law obviously refers to the equal construction of these laws with regard to the entire United States, and not with regard to the position or feelings of the court in the State of Colorado.

With reference to the offense that was committed, the United States Supreme Court can construe any state statute and can decide any state law and determine the laws so that they apply with their plain and ordinary meaning and it is clear that the argument in the answer brief could not in any situation be binding upon the United States Supreme Court, for if this were so the United States Supreme

Court would be foreclosed in all instances in determining matters involving state statutes where the State Supreme Court has already construed such statutes.

D. The Right to Waive a Jury Trial Is as Much a Constitutional Right as the Right to Demand a Jury Trial and the Court, Having Waived a Jury Trial in the Former Jeopardy Plea Is Bound to Waive It in the Trial in Chief.

Can the defendant waive a jury trial? We repeat that in this case the jury could not have considered anything except first degree murder with life imprisonment, or not guilty, and the Trial Court knew at the beginning of the trial that the evidence on the part of the District Attorney was and would be a charge of robbery in which a murder was allegedly committed, making this a mandatory first degree murder case. No other verdicts were possible and the Court was bound by this.

The Trial Court did not call a jury in the matter of the *plea of former jeopardy*, and this clearly required a jury since it was part of a murder case. The cases in Colorado require a jury in pleas of former jeopardy.

The Court cannot overrule a plea of former jeopardy because, from the facts within its own knowledge, the averments are true or untrue, but the issues *must be submitted to a jury*. *Dockstader* v. *People*, 43 C. 437, 97 P. 254; *Kinkle* v. *People*, 27 C. 459, 62 P. 197; *Eplen* v. *People*, 51 C. 596, 119 P. 1062.

The Court ruled there was no former jeopardy. Having thus waived a jury in a part of the case, how could the Court say that a jury was required in the principal trial?

If this is true then the ruling of the Court deprived Bobby Gallegos of a trial by jury in the plea of former jeopardy and thus he did not have equal protection of the law.

III

Conclusion

Having fully covered the points raised in the Answer Brief of the Respondent, it appears that Bobby Gallegos lost substantial constitutional rights. The United States Supreme Court is amply justified in considering the matter. The very arguments that are made in the answer brief conclusion bears out our position: for if the Supreme Court of Colorado feels the arguments made in behalf of the Petitioner before that court justify the Governor in commuting the sentence or giving a pardon, is not this an argument for direct reversal as a part of our judicial functions?

The only duty of all of us is to seek and render that elusive standard called justice. Public officers owe no duty except to follow the same broad precepts set forth so eloquently under the Constitution of the United States.

Respectfully submitted.

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